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BREXIT AND SCOTLAND

Aileen McHarg and James Mitchell

Introduction

A striking contrast between the 1975 referendum on the United Kingdom's (UK) continued membership of the (then) European Economic Community (EEC) and the 2016 European Union (EU) referendum – in addition to their differing outcomes – is the significance of territorial divergence. In 1975, although different results in the various parts of the UK had certainly been anticipated, in the event all four countries produced Yes majorities.

Result of the 1975 EC referendum

	Yes (%)	No (%)	Turnout (%)
UK	67.2	32.8	64.0
England	68.7	31.3	64.6
Scotland	58.4	41.6	61.7
Wales	64.8	35.2	66.7
Northern Ireland	52.1	47.9	47.5

In 2016, however, whereas England and Wales voted to Leave the EU, both Scotland and Northern Ireland voted to Remain.

	Remain	Leave	Turnout
UK	48.1	51.9	72.2
England	46.6	53.4	73.0
Scotland	62.0	38.0	67.2
Wales	47.5	52.5	71.7
Northern Ireland	55.8	44.2	62.7
Gibraltar	95.9	4.1	83.5

The Scottish majority in favour of EEC membership in 1975 was significantly lower than the UK-wide majority, and the two counting areas in the UK that recorded a vote against EEC membership were both in Scotland. In 2016, by contrast, Scotland produced the strongest Remain vote of any area in the UK (Gibraltar excepted), and each Scottish local authority area also voted to Remain. Although the Scottish National Party (SNP) had supported withdrawal in the 1970s, by 2016, no major Scottish party, including the Scottish Conservatives – and indeed, no major Scottish politician – was in favour of this position. Euro-scepticism was simply not a significant feature of Scottish political debate, with UKIP consistently recording its lowest levels of electoral support in Scotland. Euro-scepticism was an English rather than a British phenomenon (Ford and Goodwin 2014: 31). Whereas the relationship between the UK and the *European* Union was a dominant feature of English constitutional debate from the early 1990s onwards, in Scotland, the European Question was crowded out by or subsumed within the Scottish Question: i.e. the relationship between Scotland and the *British* Union. While EU membership had featured prominently in debates leading up to the 2014 Scottish independence referendum, the main argument was about whether independence would *jeopardise* continued membership, not about its desirability (Douglas-Scott 2016).

The differing territorial results in the 2016 referendum are thus symptomatic of profound shifts and divergences in constitutional politics within the UK. But the Brexit referendum also speaks to an even more profoundly contested territorial constitution. In other words, the cleavages revealed by

the 2016 referendum concern not merely questions of constitutional *vision*, but also differing understandings of the constitutional significance of territorial divergence itself. In 1975, although divergent territorial majorities would have been *politically* problematic, it is unlikely that in what was then conventionally (if not necessarily appropriately) understood as a unitary state – with a single legislature and a single source of sovereign authority – territorial divergence would have been regarded as *constitutionally* relevant. Since the 1970s, however, the territorial constitution has developed into a multi-layered, asymmetric – and still evolving – system which severely challenges the assumptions of the traditional constitutional order, but without having clearly displaced them. Against this background, a key aspect of debates both before and since the 2016 referendum has thus concerned whether – and if so how – a territorially-divided result ought to be regarded as constitutionally significant.

In this article, we consider what debates about the implications of the Brexit vote for Scotland reveal about the uncertain and contested nature of the UK's territorial constitution. We focus on two key areas of constitutional uncertainty which are implicated in the Brexit process. The first is the question of entrenchment or legal security for the powers and institutions of devolved government; the second is the question of inter-governmental relations, and in particular the handling of issues of inter-twined competence. We also show how responses to the territorially divided vote have been shaped by competing conceptualisations of the nature of the decision to withdraw from the EU – which themselves reflect deeper ambiguities in the way in which the UK constitution has adapted, or failed to adapt to EU membership.

We start by outlining the relevant constitutional background. We then explore how the question of territorial divergence in relation to Brexit was framed in debates both before and after the EU referendum, including in the litigation over the decision to trigger Article 50 TEU (*Miller v Secretary of State for Exiting the European Union*). We conclude by considering how the Scottish dimension to Brexit may play out over the next few years.

Constitutional Background

In 1979, Vernon Bogdanor maintained that the strongest of its 'tacit understandings' was the 'profoundly unitary nature of the United Kingdom, as expressed in the supremacy of Parliament.' (Bogdanor 1979: 7) Implicit was the notion that the UK was *one and indivisible*, that each part was treated alike. A range of alternative understandings emerged following challenges to the UK's territorial integrity (Kellas; Rose 1982; Keating and Midwinter; Moore and Booth 1989; Mitchell 1998; Paterson 1994). These understandings highlighted existing institutional and public policy diversity. The United Kingdom was described as centralised but not uniform. The establishment of devolved institutions for Scotland, Wales and Northern Ireland in 1999 further undermined the notion of the UK as a unitary state, both amongst scholars of the constitution and in official understandings. In 2001, the newly created House of Lords Constitution Committee, in its first report, attempted to define the UK constitution. It outlined five 'basic tenets of the United Kingdom Constitution': sovereignty of the crown in Parliament; the rule of law, encompassing the rights of the individual; union state; representative Government; membership of the Commonwealth, the European Union, and other international organisations (House of Lords 2001: para.17). But what was understood by the union state was unclear.

The ambiguity in the union state comes down to the simple question of the territorial distribution of power. While the union state or, more accurately the state of unions (Mitchell 2009), acknowledges institutional and public policy diversity, it says little about where power ultimately lies. There had been much debate on whether and how the Scottish Parliament's existence and powers could be entrenched. The Constitutional Convention, established to devise a scheme of devolution between

1989 and 1992, wrestled with this issue (see Paper of Constitutional Convention NAS GD489) It was founded on the principle of popular sovereignty – ‘the sovereign right of the Scottish people to determine the form of government best suited to their needs’ (Kellas 1992: 51)) – and was endorsed by almost all Labour MPs at the time, including Gordon Brown and John Smith, though Tony Blair was clear that the Westminster Parliament remained sovereign (*Scotsman*, 4 April 1997). Could Westminster simply abolish the Scottish Parliament by a simple Act of Parliament? Entrenchment was one of the outstanding issues that the Convention asked a Constitutional Commission to consider following the 1992 election. It concluded that the Convention ‘endorses the principle of entrenchment in relation to Scotland’s Parliament... in order that these would be incapable of being unilaterally amended at a later date by the Westminster Parliament’ (Constitutional Commission 1994: 22).

In the first edition of his classic text, Bogdanor argued that it was ‘profoundly mistaken’ to think that power devolved meant power retained, ‘It is then in constitutional theory alone that full legislative power remains with London; and it is only in constitutional theory that the unitary state is preserved. In practice, power will be transferred, and it cannot, except under pathological circumstances, be recovered’ (Bogdanor 1979: 217). The Constitution Unit think tank, established in University College London in 1995, suggested that a ‘strong and explicit’ endorsement of devolution through a referendum might provide some entrenchment (Constitution Unit 1996). In essence, this amounted to path dependent entrenchment in which the ‘costs of reversal are very high’ (Levi 1997: 28). It might have no legal entrenchment, but politically the referendum and continuing public support for a Scottish Parliament gave protection. This emphasis on political rather than legal protection for devolved power was reinforced by the announcement during debates on the Scotland Bill of what became known as the Sewel Convention (after the Scottish Office minister Lord Sewel), i.e., the expectation that the UK Parliament would not normally exercise its continued power to legislate on matters devolved to the Scottish Parliament except with the consent of that Parliament.

There remained the question of its powers and relations with the UK Government. There had been assumptions that the devolved system of government involved the creation of something akin to dual federalism in which each level of government exercises ‘exclusive and nonoverlapping authority’. This understanding had been a key motive behind support for devolution. The Scottish Parliament was conceived as a defensive institution, designed to protect Scotland from Westminster Governments that sought to pursue policies opposed by majority opinion in Scotland. In introducing the devolution legislation in the House of Commons, Donald Dewar, explained the motivation,

We all remember that embittered disaster of the poll tax and the investment in the private Health Care International hospital in Clydebank rather than in the national health service. We all remember that, while parents wanted investment in their children's education, energy and resources were devoted to encouraging schools to opt out, and almost none of them did. This Bill is the means of ensuring that such madness - it was madness, with each and every one of those measures standing as an affront to the democratic wishes of the communities that the Administration responsible purported to represent - can certainly never happen again. We have won a popular mandate in the referendum, and we are now creating an institution that can speak for the people of Scotland, is closer to their needs and concerns, and is ultimately accountable to them (Hansard, Commons, 12 Jan 1998: Column 22).

The dual federalism model had been largely discredited in scholarship on federalism and replaced with a variety of cooperative, interdependent and interactive models. Grodzins’s metaphor of the marble cake, distinct from the dualist layered cake, viewed inter-governmental relations differently, ‘No important activity of government in the United States is the exclusive province of one of the levels [of government], not even what may be regarded as the most national of national functions,

such as foreign relations; not even the most local of local functions, such as police protection and park maintenance' (Grodzins 1966: 8). As soon became clear, devolved government was intimately connected with UK central government in banal everyday public policy (Mitchell 2010). It did not operate as a form of dual government. Bulman-Pozen and Gerken suggested that it was 'puzzling that we rarely try to connect these competing visions [cooperative and dual federalism] and imagine how the state's status as servant, insider, and ally might enable it to be a sometime dissenter, rival, and challenger' (Bulman-Pozen and Gerken 2009: 102) and suggested that 'uncooperative federalism' exists when a state uses its 'power to push federal authorities to take a new position, or when states relying on federal funds to create welfare programs that erode the foundations of the very policies they are being asked to carry out' (Ibid.:103). These would be key questions to be addressed under the system of devolution. It was easy to think that devolved government had involved either a form of dual or cooperative federalism in the early years when there was relative ideological congruence with Labour dominant in London and the main party of government in Scotland and, at least as important, when public finances reduced friction. The test of devolution would come with ideological incongruence and the public finances were under stress.

This blurring of boundaries in public policy terms was evident in the field of 'foreign policy'. While states were traditionally seen as the key actors in international politics, there was mounting evidence over recent decades of sub-state governments cutting out roles on the international stage. A distinction was drawn by Duchacek between 'initiatives and activities of a non-central government abroad that graft a more or less separatist message on to its economic, social, and cultural links with foreign nations', referred to as *proto-diplomacy* and 'activities parallel to, often coordinated with, complementary to, and sometimes in conflict with centre-to-centre macro-diplomacy' referred to as *para-diplomacy* (Duchacek 1990: 27, 32). These developments arise from divergent objective and perceptual within states (Soldatos 1990: 44-49) but a 'multi-vocal' state might create 'dissonance' or 'nuanced harmony' (Duchacek 1986: 223). If the Scottish Parliament was politically entrenched, would it have the capability to undermine UK policy or eke out a distinct policy profile or use overlapping jurisdictions involved in this interdependent system in an area formally reserved for Westminster?

It was little surprise that debate on Scottish devolution should include debate on how a Scottish Parliament should engage with the international community and particularly relations with the EEC/EU. The main report of the Royal Commission on the Constitution, published less than a year after the UK joined the EEC, had dismissed the EEC's relevance for devolution though a minority report issued by two Commissioners thought the main report had 'seriously underestimated the likely consequences' of membership of the EEC (Crowther-Hunt and Peacock 1973: para.12). Prior to devolution, the Conservative Government was wary of supporting an office in Brussels representing Scottish interests (Mitchell 1995). The European question had been one of the three difficult issues, along with the electoral system and relations between London and Edinburgh, that confronted the Constitutional Convention when it drew up a scheme of devolution in the period before Labour came to office in 1997 (NAS GD489.1.1). One of the Convention's working group concluded that there was a consensus on need for a Scottish representative office in Brussels and a statutory entitlement for the Scottish Parliament/Executive representation in UK Ministerial delegations (Ibid.: GD489.1.2). Opponents of devolution feared that devolved government would seek to pursue contrary goals to UK central government. The Scottish National Party had launched its 'Independence in Europe' policy in 1988, arguing that Scotland needed to be represented in EEC's decision-making. The challenge for devolutionists was to find a voice in the European policy process for the devolved institutions that would not undermine UK central government. They sought the institutional expression of para-diplomacy and avoid proto-diplomacy.

In their 2002 study, Bulmer et al suggested that devolution had 'engendered a shift to a form of multi-level governance more in line with the European model and involving a dispersal of authority with the allocation of functions and activities to different levels of governance' (Bulmer et al 2002: 159). This followed from a 'number of contradictory dynamics' (Jeffery and Palmer 2007: 218):

- The UK central state has (asymmetrically) devolved significant competences to new institutions in Scotland, Wales and Northern Ireland
- Responsibility for aspects of many of those competences – for example in agriculture, economic development, environment, transport – has already been transferred to the EU level
- So the devolved institutions can only exercise 'their' competences if they can contribute to EU decision-making processes in those fields
- But the UK centre regards the EU as an aspect of foreign policy, for which it has exclusive responsibility
- And the EU is constituted by member states as represented by central governments and recognises regions only in an advisory role. (ibid.)

(Non-statutory) Joint Ministerial Committees (JMCs) were set up bringing together Ministers from UK central Government and the devolved administrations to discuss matters of mutual interest. The JMC (Europe) was unusual in meeting regularly since its establishment and allowed the devolved administrations to be consulted on EU policy. An assessment of the operation of JMCs published in 2007 concluded that the JMC (Europe) was the only JMC to have conformed with 'Donald Dewar's original vision of the role of the JMC' (Trench 2007: 167).

Nevertheless, both the question of entrenchment and the machinery for inter-governmental relations (IGR) continued to be regarded as weaknesses of the devolution arrangements. Lack of constitutional security for Scottish institutions, and the absence of an effective Scottish voice in matters formally reserved to the UK level were also key elements of the constitutional case made by proponents of independence in debates leading up to the 2014 independence referendum (McHarg 2016: ???). The Smith Commission, set up to consider reforms to devolution in the wake of the referendum, recommended both a statutory guarantee of the permanence of the devolved institutions and that the Sewel Convention be put on a statutory footing, and identified a need for the IGR machinery to be strengthened (Smith Commission 2014: 14). The former recommendations were implemented by sections 1 and 2 of the Scotland Act 2016, albeit hedged about with continued insistence that these remained essentially political guarantees and did not affect the continuing sovereignty of the Westminster Parliament (see Himsworth 2016). But suggestions that basic principles of inter-governmental co-operation should be put on statutory footing (see Devolution (Further Powers) Committee 2016: ???) continued to be resisted.

Brexit and the Territorial Constitution

The EU referendum demonstrates very starkly the importance of, as well as the uncertainty surrounding, issues of both constitutional security and constitutional voice for the devolved institutions in Scotland and elsewhere. Given the intertwined nature of competences across the devolved, UK and EU levels, EU law operates not merely as an external constraint upon devolved decision-making, but as a key element in the policy-making process within a dispersed and multi-level system of government. The decision to withdraw from the EU, although in formal terms a matter reserved to the UK level (Scotland Act 1998, Sch 5, Pt 1, para 7(1)), therefore necessarily has major implications for the Scottish Government and Scottish Parliament. The removal of the obligation to comply with EU law (Scotland Act 1998, s29(2)(d)) and the 'repatriation' of functions currently exercised at EU level raises a range of questions concerning the future scope and exercise of devolved competences, the balance of power between the UK and Scottish levels, and how the

constraining and homogenising functions performed by, and the policy supports provided by, the EU will be replicated in future, if at all.

In other words, the referendum gives rise to questions of constitutional security concerning the degree of control that the devolved institutions are able to exercise in determining how Brexit will affect devolved decision-making, and questions of constitutional voice, in terms of how much influence they are able to exert over the form that Brexit takes, or indeed whether it happens at all. These are questions which would arise irrespective of whether there were divergent territorial majorities. But the fact that Scotland voted so clearly to Remain, and the explicit link drawn by the SNP in its 2016 Holyrood election manifesto between withdrawal from the EU contrary to the wishes of a majority of Scottish voters and the 'material change in circumstances' necessary to justify a second independence referendum (Scottish National Party 2016: 24), have substantially increased their political importance.

Responses to these questions have naturally been shaped by a range of different factors, including considerations of political opportunism and institutional positioning. However, an important factor has been competing conceptualisations of the Brexit decision, which in turn seem to reflect different understandings of the relationship between the UK and the EU. Is it, on the one hand, a matter of foreign affairs; a question simply of adjusting one of the UK's external relationships, and therefore properly reserved to the UK government? Or should it, on the other hand, be seen as a matter of constitutional reform, thereby requiring a shared process of redrawing and rebuilding the UK's multi-level constitutional architecture in light of the removal of one of its major elements?

Dual Majority, Vetoes and Multi-Level Governance

Prior to the Brexit referendum Nicola Sturgeon had argued for a 'double majority' provision, an idea familiar to the EU member states, which would require a majority in each component nation of the UK for Leave. The argument was also made in the Commons during debates on the European Union Referendum Bill. SNP MPs referred to federal states, including the United States, in which constitutional amendment required similar double majorities but this was rejected by other Members from across the Commons. A Welsh Labour MP argued that the Bill referred to international treaties which would not be subject to a double majority in the United States as such matters would be determined by the executive branch and confirmed by the Senate with no veto rights for individual states. This understanding of the devolved polity involves a significant break with any past understandings of the UK as a unitary state or state of unions but might signify a shift towards a federal constitution. Theresa May's off-hand reference to Scotland, Wales, Northern Ireland and England flourishing 'side-by-side as equal partners' in her 2012 Scottish Conservative conference speech (May 2012), and rhetoric during and immediately after the independence referendum concerning a federal-type arrangement, might give sustenance to a political claim to the need for a double majority but highlights the highly contested nature of understandings of the UK constitution. A Conservative MP objected insisting that on matters of foreign affairs 'we speak as a nation with one voice' (HC Deb 16 June 2015, col.189) rejecting SNP claims that the UK was a 'multinational state' (HC Deb 16 June 2015 col.190).

There were three aspects to this debate. First, there was the question of the SNP's preferred outcome. Kenneth Clarke intervened to suggest that the 'secret wish' of the SNP is for 'Scotland to vote yes and England to vote no' as this would mean that the 'end of the United Kingdom would probably be quite imminent' (Ibid.). There was much speculation along these lines during the referendum. The SNP insisted that its preference was for a Yes majority across the UK. Its reasoning was that an independent Scotland would be at a disadvantage if it was not part of the same common market as its large immediate neighbour. While there might be tactical advantage in highlighting the

divergence of Scottish and rUK opinion, there would be significant challenges that would need to be addressed in any second independence referendum.

Second, there was the issue of the line between domestic and foreign affairs. One of the objections to the EU from its opponents was that the 'competence creep' of European institutions had intruded into domestic affairs beyond that which had been envisaged when the UK joined in 1973. In July 2012, the UK launched a two year review of the balance of competences producing 32 reports. The final report was on 'Subsidiarity and Proportionality' noted the evidence from a range of bodies, including the Scottish Government, on the 'importance of adequate structures, processes and time frames to ensure adequate consultation of devolved administrations and assemblies, as well as local authorities, within the UK on EU proposals' (HMG 2014: 3.54). The reports highlight the manner in which European integration has undermined any notion of a sharp boundary between domestic and foreign affairs as the minority report of the Kilbrandon Commission had presciently noted.

Third, it would be difficult, therefore, to extend the already discredited notion of a discrete dual system of devolved and central government to include a third discrete level. As has been long acknowledged, the EU has been a complex system, often described as a system of 'multi-level governance' though 'level' may convey an absent discreteness. The overlapping, complex, quotidian relations involved in this system of multi-level governance means that leaving the EU would have significant implications for the devolved administrations.

There was never any prospect of the UK Government conceding a double majority but there are issues concerning the extent to which and manner in which a Scottish voice would be heard in debates on the implementation of Brexit. If the devolved administration were unable to veto Brexit, could they influence its nature or could a special dispensation be permitted. Scotland was not the only part of the UK to have rejected Brexit. Northern Ireland and London had also voted to Remain. Northern Ireland's situation was complicated by Strand Two of the Belfast Agreement on relations between Northern Ireland and the Irish Republic (HMG 1998). Concerns that Brexit would result in a hard border on the island of Ireland with the potential to disrupt the peace process and London's economic status required special attention. There were interests other than geographic interests that required to be accommodated. There has been speculation on the nature of a deal done with Nissan to ensure the Japanese company invested in Sunderland by the UK Government (Münchau 2016).

The UK Government is caught in a classic two-level game (Putnam 1988), negotiating with competing domestic demands in which Scotland is only one, and conducting negotiations with EU27. Its domestic negotiations pressures are considerable. While the Scottish Government might find allies both domestically and at the international level, it enters a crowded field of institutions pursuing divergent interests. The expectations of many leading supporters of Brexit pull the May Government in a different direction from the Scottish Government. While the Scottish Government has been warmly received across Europe since the referendum, there has been a very clear message from the European Union that no deal would be acceptable which would leave the UK better off to avoid sending a signal to remaining member states that leaving was cost free or attractive.

The Miller Litigation, the Sewel Convention and the Nature of the Territorial Constitution

The question of how and by whom the decision to leave the EU should be taken was unexpectedly reopened in the wake of the referendum. While it was clearly recognised that the referendum result was in legal terms merely advisory, since the European Union Referendum Act 2015 specified no legal consequences that should flow from a Leave (or indeed a Remain) vote, insofar as the issue had been considered at all prior to the referendum, it was assumed that a Leave majority would provide

sufficient *political* justification for the UK Government to give notification of the UK's intention to withdraw from the EU under Article 50 of the Treaty on European Union, relying on its prerogative powers to conduct foreign affairs (see Phillip Hammond MP, HC Deb Vol 606, col 517, 25 February 2016). However, legal opinions began circulating shortly after the referendum (see in particular Barber *et al* 2016) arguing that, since Parliament had expressed its intention in the European Communities Act 1972 (ECA) and related statutes that the UK should be a member of the EU, and that rights derived from EU law should be available in domestic law, this intention could not be frustrated by the government acting under the prerogative alone. In order to fulfil the UK's "constitutional requirements" for a decision to withdraw from the EU under Article 50, it was argued, it would be necessary for the UK Parliament to enact a further statute authorising withdrawal. This argument was taken up in a crowd-funded legal challenge before the Divisional Court in London (*R (Miller) v Secretary of State for Leaving the European Union*).

The *Miller* case was important because it, in effect, rejected the UK Government's characterisation of the withdrawal decision as a matter of foreign affairs and effectively 'reconstitutionalised' it. This then opened up an opportunity, following the claimants' somewhat unexpected success in the Divisional Court ([2016] EWHC 2768 (Admin)), for the Scottish Government to revive its claim that that withdrawal required devolved consent, this time via the Sewel Convention. At the same time, the decision of the Northern Irish High Court (*McCord and Agnew* [2016] NIQB 85) in separate proceedings raised in Belfast made it imperative for the Scottish Government to intervene for *defensive* reasons. Although the Northern Irish court held that legislation was not required to trigger Article 50, it also held that, even if it had been, such legislation would not engage the Sewel Convention because, at least in Northern Ireland, the Convention applied only to legislation affecting matters *within the scope of* devolved competence, not to legislation *varying the scope of* devolved competence. Had this ruling been allowed to stand, it could have created significant problems for the Scottish Government's ability to influence the *implementation* of Brexit via the promised Great Repeal Bill and related legislation, in particular the question of where competences 'repatriated' from Brussels should be exercised in future. Accordingly, when the UK Government appealed the Divisional Court's decision in *Miller* to the Supreme Court, the Lord Advocate intervened on behalf of the Scottish Government, as did the Counsel General for Wales on behalf of the Welsh Government.

The interventions from the devolved governments, together with the joining of the Attorney General for Northern Ireland's reference to the Supreme Court of the various devolution issues raised in *McCord and Agnew* with the *Miller* appeal, gave the Supreme Court proceedings a very different flavour to the Divisional Court case. Whereas the Divisional Court's decision was very narrowly focussed on the historically-central constitutional relationship between the UK Parliament and the Crown, the various devolution submissions presented a more radical and pluralist vision of the location of constitutional authority within the UK, albeit one which continued to play down (somewhat problematically from a Scottish and Northern Irish perspective) the constitutional significance of the referendum result itself.

The Lord Advocate's argument proceeded in two stages. First, he agreed with the *Miller* claimants that an Act of Parliament was required to trigger Article 50. However this was not merely because of the impact on the ECA, but also because of its effects on the Scotland Act 1998. Because of the interweaving of devolved competences and EU law, Brexit would necessarily affect the scope of devolved competences, by removing both the obligation on the devolved institutions to act compatibly with EU law and the Scottish Government's responsibility for implementing and observing EU law in areas within devolved competence. Secondly, for the same reason, he argued that legislation authorising withdrawal would be subject to a requirement to gain the consent of the Scottish Parliament under the Sewel Convention, because as the Convention has operated in Scotland, consent is required where UK legislation affects the scope of devolved competence and

not merely an existing devolved competence. Although he accepted that, as a matter of convention, the Supreme Court could not *enforce* an obligation to seek devolved consent, the Lord Advocate argued that it was nevertheless open to the Court to declare what was *required by* the Convention as part of the “constitutional requirements” referred to in Article 50. Moreover, this argument was strengthened by the fact that, as noted above, the Sewel Convention had been placed on a statutory footing for Scotland by section 2 of the Scotland Act 2016.

The UK Government’s response was to argue that the devolution statutes, like the ECA, assumed but did not require EU membership, and that in any case, since foreign affairs, including relations with the EU, is a reserved matter, they could not have been said, either expressly or by necessary implication, to have “occupied the field” in relation to EU withdrawal such as to oust the foreign affairs prerogative. Indeed, far from being a central part of the devolution schemes, the UK government characterised the EU law provisions in the devolution statutes as essentially belt and braces provisions, designed simply to ensure that the UK’s international law obligations in relation to EU law are complied with. As the Advocate General for Scotland (the UK Government’s Scottish Law Officer), Lord Keen of Elie, put it in oral argument,

Nothing in the issue of Article 50 or its notification or indeed withdrawal from the EU altogether alters the existence of the devolved legislatures, or the essential structure and architecture of the devolution settlements. (Transcript, 6 December 2016, 80 – 81)

It followed, according to the UK Government, that no requirement of devolved consent arose. But in any case, it argued that, as matter purely of convention, the legislative consent requirement was non-justiciable, and that the 2016 Act had made essentially no difference to its legal status. Again, according to Lord Keen ‘it was made perfectly clear during the passage of the Scotland Act 2016 that the intention was simply to incorporate in statutory form the existing convention and no more than that’ (Transcript, 6 December 2016, 104).

In its decision (by an 8 – 3 majority) that legislation was required to authorise withdrawal, the Supreme Court essentially ducked the devolution issues. On the question of the impact of EU withdrawal on the devolution settlement, the decision was ambiguous and ultimately inconclusive. Whilst initially appearing to accept the UK Government’s characterisation of the relationship between the devolution statutes and EU law ([2017] UKSC 5 at [129] to [130]), the majority decision (with which the dissenting judges agreed on these points) went on to accept that withdrawal from the EU would, by removing the obligation on the devolved institutions to comply with EU law, expand devolved competences and would thereby remove rights granted on citizens to challenge the actions of the devolved institutions on the basis of EU law (*ibid*, [130] to [131]). The court went on to say:

As already explained, it is normally impermissible for statutory rights to be removed by the exercise of prerogative powers in the international sphere. It would accordingly be incongruous if constraints imposed on the legislative competence of the devolved administrations by specific statutory provisions were to be removed, thereby enlarging that competence, other than by statute. A related incongruity arises by virtue of the fact that observance and implementation of EU obligations are a transferred matter and therefore the responsibility of the devolved administration in Northern Ireland. The removal of a responsibility imposed by Parliament by ministerial use of prerogative powers might also be considered a constitutional anomaly. (*ibid*, [132])

However, the court ultimately declined to reach a definitive view on whether the EU provisions in the devolution statutes imposed a discrete requirement for legislative authorisation of withdrawal, over and above the requirement it had already decided arose from the ECA.

On the application of the Sewel Convention, the decision was similarly inconclusive. Taking a very conservative line, the court held that while it was permitted to recognise the operation of conventions where this was relevant to the resolution of a legal question, it could neither enforce them *nor adjudicate upon their operation or scope* because 'those matters are determined within the political world.' (ibid, [146]) The court also held that the status of the Sewel Convention had not been changed by section 2 of the Scotland Act 2016. Given the wording of section 2, the court considered that the UK Parliament was:

not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement.... the purpose of the legislative recognition of the convention was to entrench it as a convention. (ibid, [148] – [149])

In concluding that there was therefore no legal requirement to seek the consent of the devolved legislatures to an EU withdrawal Bill, the court was careful not to suggest that there was no such requirement *at all*. On the contrary, the court stated that:

In reaching this conclusion we do not underestimate the importance of constitutional conventions ... The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law. (ibid, [151])

This nuanced conclusion was, perhaps predictably, lost in the reporting of the decision. Unsurprisingly, the UK Government sought to grasp a partial victory from its broader defeat in *Miller*, immediately declaring that the ruling meant that no devolved consent was required to a withdrawal Bill. The Scottish Government, equally predictably (and with some justification) asserted the contrary view that devolved consent *was* required and declared its intention to table a Legislative Consent Motion (LCM) before the Scottish Parliament. In the event, however, it chose not to do so, claiming that there was insufficient time to do so given the accelerated timetable for consideration of the European Union (Notification of Withdrawal) Bill at Westminster. Instead, a motion was debated in the Scottish Parliament on 7 February 2017 that 'the Parliament agrees ... that the UK Government's European Union (Notification of Withdrawal) Bill should not proceed', *inter alia* because 'the UK Government has set out no provision for effective consultation with the devolved administrations on reaching an agreed UK approach to the negotiations on implementing Article 50', which was passed by a majority of 90 to 34. Whether the timetable was the real reason for not pressing ahead with a formal LCM is not clear. It may be that the Scottish Government feared that an LCM would be rejected by the Presiding Officer, or decided that it would be preferable to avoid a direct confrontation with the UK Parliament (and thereby avoid setting a precedent for overriding a refusal of consent), or that a formal LCM would be less likely gain cross-party support.

The *Miller* decision was not entirely a defeat for the Scottish Government. In formal terms, it left it in no worse position in relation to the withdrawal decision itself than it would have been if the UK Government had been able to trigger Article 50 under prerogative powers. And it at least avoided any unhelpful legal ruling on the scope of the Sewel Convention that might have undermined its

argument that the Great Repeal Bill and other implementing legislation will require an LCM. However, the hardening of positions that litigation usually engenders may itself have contributed to the UK Government's apparent unwillingness to concede any special treatment for Scotland in relation to Brexit. In addition, the Court's ruling that Sewel is non-justiciable, notwithstanding the 2016 Act, means that there is no possibility of appealing to an independent arbiter in the event that the UK Government chooses to ignore Sewel in future.

The Supreme Court's decision to avoid the issues that devolution raises was perhaps not surprising, but at the same time not inevitable. It is clear from both domestic and foreign precedents that the justices could have been bolder in pronouncing on the meaning of convention if they had wished to do so. It is also by no means inconceivable that, in a different context, the court might have been more reluctant to conclude that statutory recognition of the Sewel Convention had no legal effect whatsoever. The unusually politically-sensitive nature of the *Miller* case (manifested in overt attacks on judges in the wake of the Divisional Court's ruling) may have deterred the court from adopting an expansive view of its constitutional role, given that distinguishing the *legal* question of how Article 50 was to be triggered from the *political* question of whether Brexit was desirable was essential to the maintenance of its legitimacy. Nevertheless, the structural position of the Supreme Court, as a UK institution which essentially replicates the balance of power in the territorial constitution, may undermine its ability to construct an account of the constitution which acknowledges its plural and contested nature. This perhaps does not bode well for future cases in which competing understandings of the territorial constitution might also be at stake, such as a dispute about the legality of a second independence referendum (see Anderson *et al*, 2012).

The case has also exposed the limitations of the Sewel Convention as a mechanism for managing territorial relations in two ways. First, it underlines the weakness of relying on convention to modify an essentially unitary *legal* understanding of the nature of the state. The Supreme Court's claim that the effect of section 2 of the 2016 Act was to *politically* entrench the convention is no sort of entrenchment at all, since in the absence of any enforcement mechanism, it still relies on the good will of the UK institutions for its observance.

Secondly, the Scottish Government's case in *Miller* was arguably seeking to over-extend the function of the Sewel Convention. What was conceived as a mechanism for protecting the autonomy of the devolved institutions against legislative encroachment (Elliott, 2015), has been relied upon to assert a more general principle of territorial consent to constitutional change – a principle for which the shared constitutional understanding necessary to give rise to a binding conventional obligation is not (yet) present. Whilst Brexit underlines the necessity of such a mechanism in a territorially-divided polity, the political divisions exposed by the Brexit vote make it much less likely that a shared constitutional understanding will emerge. In short, a conventionally-based constitution is one which requires a high degree of consensus about constitutionally-appropriate behaviour. Where such consensus is lacking, conventions are themselves likely to become a site of political contestation rather than reliable constitutional guarantees.

Whither the Territorial Constitution?

The enactment of the European Union (Notification of Withdrawal) Act 2017 and the Prime Minister's subsequent letter to the President of the European Commission on 29 March 2017 bring one set of debates about the constitutional significance of Scotland's Remain vote to a close. However, attention now moves on to new constitutional questions. The forthcoming Great Repeal Bill will test the ability of the mechanisms of the political constitution to provide adequate security and voice for the devolved governments in protecting their interests in the implementation of Brexit.

More dramatically, the denial of a decisive Scottish constitutional voice in the Brexit decision has reopened the option of a constitutional exit in the form of a second independence referendum.

In anticipation of Theresa May's triggering of Article 50 without securing the consent of the Scottish Government to the proposed shape of the Brexit negotiations, Nicola Sturgeon announced on 13 March her intention to seek the agreement of the UK Government to facilitate the holding of a lawful independence referendum in Autumn 2019. This request was confirmed by a majority vote in the Scottish Parliament on 28 March (Motion S5M-04710 (Nicola Sturgeon) SPOR, 28 March 2017 (Session 5)). As had occurred in relation to the 2014 referendum, the would involve the enactment of an Order in Council under section 30 of the Scotland Act to make clear that the reservation of the Union (Scotland Act 1998, Sch 5 Part 1 para 1 (b)) did not include a referendum on independence. The Prime Minister's response was to dismiss this request on the basis that the time was not right for another independence referendum, a stance made easier by the fact that, despite Scotland's majority for remaining in the EU, Brexit has not (yet) had the decisive impact on support for independence that some had anticipated. The Scottish Question, it would seem, continues to trump the European one.

Nevertheless, at the time of writing, it is unclear whether the Scottish Government might seek to proceed with a referendum Bill anyway – the question of Holyrood's legal competence to authorise a referendum having been sidestepped rather than resolved in relation to the 2014 vote. Such a move would be certain to provoke further litigation, in which the constitutional authority of the Scottish Parliament, and the ability of the UK constitution to recognise competing sovereignty claims would be directly implicated. The weakness of the political constitution in the face of the legal constitution which was demonstrated in *Miller* perhaps gives limited grounds for optimism that the Scottish Government would prevail. On the other hand, if Scottish public opinion shifts decisively in favour of a second referendum, it is hard to imagine that the UK Government could continue to obstruct it for long. While the UK constitution may not have the legal capacity to adequately accommodate Scots' claims for constitutional recognition, neither does it have the political strength to resist them indefinitely.

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